Menara Kuala Lumpur Sdn Bhd v Bungy Malaysia Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 24NCC(ARB)-40–12 OF 2013
ABU BAKAR JC
10 JUNE 2014

Arbitration — Award — Question of law — Plaintiff seeking court's determination of questions of law arising out of final award — Restrictive approach when reviewing awards — Whether arbitrator erred in interpreting collective agreement — Whether law correctly applied by arbitrator — Whether arbitrator erred in drawing factual findings from interpretation of the collective agreement — Whether justification for award disturbed — Arbitration Act 2005 s 42

Civil Procedure — Pleadings — Material facts — Issue of essence of time not pleaded — Whether a questions of law which need not be pleaded — Relevant facts also not pleaded — Whether tribunal rightly refused to consider the issue

Contract — Breach — Time is of the essence — Issue of essence of time not pleaded — Relevant facts also not pleaded — Whether tribunal rightly refused to consider the issue — Contracts Act 1950 s 56

Contract — Interpretation — Collective agreement — Whether court may go beyond cold print in interpreting agreement — Whether background of surrounding circumstances may be taken into account — Whether extrinsic evidence admissible — Evidence Act 1950 s 94

The plaintiff filed this suit pursuant to s 42 of the Arbitration Act 2005 ('the Act') for the court to determine some questions of law arising from the learned arbitrator's final award. The award in favour of the defendant, arose as a result of disputes between the plaintiff and the defendant arising from a collaboration agreement dated 27 January 2006 ('the CA') executed between the parties. Under the CA, the defendant was supposed to provide some adventures activities at the premises of the plaintiff ('the premises'). The premises was leased from the Government of Malaysia under a concession ('the concession'). The concession was to expire on 31 May 2009. The plaintiff contended that there was basis for the award to be challenged as the arbitrator had erred in law. The plaintiff raised the following issues: (i) whether the arbitrator had erred in law in construing cl 3, cl 12, cl 5 and Schedule 1 of the CA; (ii) whether based on the arbitrator's finding that the CA had not been discontinued and the fact

that the concession had yet to be renewed as of 31 May 2009, whether the arbitrator had erred in law in construing that the CA had not terminated, come to an end or lapsed after a reasonable amount of time; (iii) whether the plaintiff's request to the defendant to vacate the premises was lawful; (iv) whether the arbitrator when making a finding that time was of the essence in respect of the CA, had erred in law in failing to consider the application of s 56 of the Contracts Act 1950 ('s 56'); and (v) whether the arbitrator had erred in law in finding that the parties had agreed to defer revenue sharing, but then made a conflicting award by denying the plaintiff the counterclaim. The plaintiff submitted that by virtue of cl 3 of the CA, the plaintiff had no longer any obligations towards the defendant because the condition imposed in the said provision had not been met as of 31 May 2009. The condition was the requirement that the concession be extended immediately after 31 May 2009 for a further period of twenty years thereafter. With regards cl 5 and Schedule 1 of the CA, it revolved around the issue whether the execution of phase 2 of the CA needed the approval of the plaintiff's board of directors and the plaintiff's holding company's board of directors. Further the plaintiff submitted the findings made by the arbitrator had taken into account extrinsic evidence which is contrary to s 94 of the Evidence Act 1950. The defendant contended that the plaintiffs had not shown the questions of law posed will substantially affect the rights of the parties in contravention of s 42(1A) of the Act. The defendant claimed that there was no justification for the award to be disturbed.

Held, dismissing the plaintiff's application with costs of RM35,000:

(1) The courts adopt a restrictive approach when reviewing awards arising out of arbitration. The findings of the arbitrator must be juxtaposed with the scope and limits upon which the decision of the same can be reviewed. The findings cannot be faulted merely because the court considers that different conclusions should be preferred based on evidence before the arbitrator. The only basis for the interpretation of the CA by the arbitrator to be considered wrong and be set aside was to find that the same had erred in law (see paras 25, 39–40); *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401 referred.

(2) There was no justification whatsoever to disturb the findings of the arbitrator in his interpretation of cll 3 and 12 of the CA. The law was correctly applied by the arbitrator in his interpretation of those clauses. The arbitrator was entitled to go beyond the cold print of cll 3 and 12 of the CA. There is no strict rule for the interpretation of the same and the background of the surrounding circumstances ought to be taken into account to determine the intention behind the language of the written contract (see paras 41 & 50).

(3) The plaintiff was not entitled on 9 December 2009 or any earlier date, to discontinue the CA in the light of cl 3. After a lapse of a reasonable time after 31 May 2009, the CA had not terminated, come to an end or lapsed. Hence, the request by the plaintiff to the defendant to vacate the premises was invalid in the circumstances (see para 52).

(4) The approval from the two boards of directors was withheld intentionally without justification and this amounted to bad faith. The assertion the approval was required ran contrary to evidence. The arbitrator was perfectly entitled to draw these factual findings to conclude the surrounding circumstances in his interpretation of cl 5 and Schedule 1 of the CA (see paras 55–56).

(5) The arbitrator was entitled to admit extrinsic evidence as long as the CA did not accurately apply to existing facts as suggested by the plaintiff. The facts as deduced by the arbitrator entitled him to interpret the provisions of cl 5 and Schedule 1 of the CA in the manner he deemed appropriate and in fact that interpretation could not be said to fall into an error of law (see paras 58–59).

(6) The issue on s 56 was not pleaded. The general rule is questions of law need not be pleaded, but here was a case where the facts for the application of the provision were also not pleaded. Since it was not pleaded, no blame lay against the arbitrator for not addressing this provision (see paras 63–64).

(7) It was the plaintiff who had wanted to unlawfully terminate the CA, while the defendant had wanted the CA to remain operative but only claim damages for the default by the plaintiff. The facts thus showed that in any event the provision of s 56 was not applicable for the plaintiff (see para 66).

(8) In relation to the issue of revenue sharing, the plaintiff had agreed to waive their right to the sharing of the revenue until the implementation of the adventure activities of 'skywalk' and 'skyjump'. The right to revenue sharing could only happen if phase 2 activity had been carried out and since this was not the case, the plaintiff was not entitled to revenue sharing. The plaintiff's counterclaim was therefore rightly rejected (see paras 68–69).

[Bahasa Malaysia summary

Plaintif memfailkan guaman ini di bawah s 42 Akta Timbang Tara 2005 ('Akta') untuk mahkamah memutuskan tentang soalan undang-undang yang timbul daripada award akhir penimbang tara. Award yang berpihak kepada defendan, timbul akibat pertikaian antara plaintif dan defendan berbangkit daripada perjanjian kerjasama bertarikh 27 Januari 2006 ('PK') yang dimeterai oleh pihak-pihak. Di bawah PK, defendan sepatutnya memperuntukkan

aktiviti-aktiviti kembara di premis plaintif ('premis'). Premis dipajakkan oleh Kerajaan Malaysia di bawah perjanjian konsesi ('konsesi'). Konsesi tersebut luput pada 31 Mei 2009. Plaintif menghujahkan bahawa terdapat asas bagi award yang dipertikaikan kerana penimbang tara terkhilaf dari segi undang-undang. Plaintif membangkitkan isu-isu berikut sama ada penimbang tara terkhilaf dalam menafsir klausa-klausa 3, 12, 5 dan Jadual 1 PK; sama ada dapatan penimbang tara bahawa PK tidak dihentikan dan fakta bahawa konsesi tersebut belum diperbaharui pada 31 Mei 2009, sama ada penimbang tara terkhilaf dalam undang-undang dalam menafsirkan bahawa PK belum ditamatkan, berakhir atau luput selepas tempoh masa yang munasabah; sama ada permohonan plaintif kepada defendan untuk mengosongkan premis adalah sah; sama ada penimbang tara, semasa membuat dapatan bahawa masa adalah penting bagi PK, telah terkhilaf dalam undang-undang dalam kegagalan untuk mempertimbangkan permohonan s 56 Akta Kontrak 1950 ('s 56'); dan bahawa penimbang tara terkhilaf dalam undang-undang dalam memutuskan bahawa pihak-pihak bersetuju untuk menangguh perkongsian hasil tetapi kemudian membuat award bertentangan dengan menafikan tuntutan balas plaintif. Plaintif menghujahkan bahawa menurut klausa 3 PK, plaintif tidak lagi mempunyai kewajipan terhadap defendan kerana syarat yang dikenakan dalam peruntukan tersebut tidak dipenuhi pada 31 Mei 2009. Syarat tersebut merupakan keperluan bahawa konsesi dilanjutkan sejurus selepas 31 Mei 2009 bagi tempoh lanjut 21 tahun selepas itu. Berkenaan klausa 5 dan Jadual 1 PK, ia berkisar isu sama ada pelaksanaan Fasa 2 PK memerlukan kelulusan lembaga pengarah plaintif dan lembaga pengarah yang dipegang oleh syarikat plaintif. Selanjutnya, plaintif menghujahkan bahawa dapatan oleh penimbang tara telah mengambil kira keterangan luar yang bertentangan dengan s 94 Akta Keterangan 1950. Defendan menghujahkan bahawa plaintif-plaintif tidak menunjukkan bahawa soalan-soalan undang-undang yang ditujukan akan memberi kesan besar kepada hak-hak pihak-pihak, bertentangan dengan s 42(1A) Akta. Defendan menghujahkan bahawa tiada justifikasi bagi award yang diganggu.

Diputuskan, menolak permohonan plaintif dengan kos sebanyak RM35,000:

(1) Mahkamah mengguna pakai pendekatan sekatan dalam menyemak award-award yang berbangkit daripada timbang tara. Dapatan-dapatan penimbang tara mesti dibandingkan dengan skop dan tahap dalam mana keputusan tersebut bolehdisemak semula. Dapatan-dapatan tidak boleh tersesar hanya kerana mahkamah mempertimbangkan bahawa kesimpulan berbeza harus diambil berdasarkan keterangan di hadapan penimbang tara. Satu-satunya asas bagi tafsiran PK oleh penimbang tara yang dianggap salah dan diketepikan apabila didapati bahawa ia terkhilaf dari segi undang-undang; *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401 dirujuk (lihat perenggan 25, 39–40).

(2) Tiada apa-apa justifikasi untuk mengganggu dapatan penimbang tara

dalam tafsirannya atas klausa-klausa 3 dan 12 PK. Undang-undang telah diguna pakai dengan betul oleh penimbang tara dalam tafsirannya terhadap klausa-klausa tersebut. Penimbang tara berhak melampaui klausa 3 dan 12 PK. Tiada peraturan ketat bagi tafsirannya dan latar belakang hal keadaan harus diambil kira dalam menentukan niat di sebalik bahasa satu-satu kontrak bertulis (lihat perenggan 41 & 50).

(3) Plaintif tidak berhak pada 9 Disember 2009 atau tarikh yang lebih awal, untuk menghentikan PK berdasarkan klausa 3. Selepas luput masa yang munasabah selepas 31 Mei 2009, PK tidak ditamatkan, tamat atau luput. Oleh itu, permintaan plaintif kepada defendan untuk mengosongkan premis adalah tidak sah berdasarkan hal keadaan (lihat perenggan 52).

(4) Kelulusan daripada dua lembaga pengarah disekat dengan sengaja tanpa justifikasi dan ini terjumlah kepada niat jahat. Hujahan bahawa kelulusan diperlukan adalah bertentangan dengan keterangan. Penimbang tara amat berhak untuk membuat dapatan fakta ini untuk membuat kesimpulan mengenai hal keadaan dalam tafsiran beliau atas klausa 5 dan Jadual 1 PK (lihat perenggan 55–56).

(5) Penimbang tara berhak untuk menerima masuk keterangan luar selagi PK tidak mengguna pakai fakta yang ada oleh plaintif. Fakta-fakta yang dikemukakan oleh penimbang tara memberikan hak kepadanya untuk mentafsirkan peruntukan klausa 5 dan Jadual 1 PK dalam cara yang dilihatnya sesuai dan malahan, tafsiran tersebut tidak boleh dikatakan sebagai terjumlah kepada kekhilafan undang-undang (lihat perenggan 58–59).

(6) Isu s 56 tidak diplidkan. Peraturan am adalah soalan undang-undang tidak perlu diplidkan tetapi ini merupakan kes di mana fakta-fakta bagi permohonan peruntukan juga tidak diplidkan. Oleh kerana ia tidak diplidkan, penimbang tara tidak boleh dipersalahkan kerana tidak melihat pada peruntukan ini (lihat perenggan 63–64).

(7) Pihak plaintif yang ingin menamatkan PK secara tidak sah manakala defendan ingin PK kekal beroperasi tetapi hanya menuntut ganti rugi bagi keingkaran oleh plaintif. Fakta menunjukkan bahawa dalam apa jua keadaan, peruntukan s 56 tidak terpakai kepada plaintif (lihat perenggan 66).

(8) Berkenaan isu perkongsian hasil, plaintif telah bersetuju untuk mengetepikan hak mereka ke atas perkongsian hasil sehingga pelaksanaan aktiviti-aktiviti kembara 'skywalk' dan 'skyjump'. Hak kepada perkongsian hasil hanya boleh berlaku sekiranya aktiviti fasa 2 telah dijalankan dan oleh kerana ini bukanlah keadaannya, plaintif tidak berhak atas perkongsian hasil. Tuntutan balas plaintif, dengan itu, ditolak (lihat perenggan 68–69).]]

Notes

For a case on question of law, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) para 1793.

For cases on materials facts, see 2(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6794–6795.

For cases on time is of the essence, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3455–2468.

Cases referred to

AJWA for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625; [2013] 2 CLJ 395, FC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Government of India, The v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441, FC (refd)

Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd [2004] 1 MLJ 401, FC (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428; [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239, SC (refd)

Maimunah bt Deraman (practising as an architect under the name of D'mai Architect) v Majlis Perbandaran Kemaman [2010] MLJU 1711; [2011] 9 CLJ 689, HC (refd)

Majlis Amanah Rakyat v Kausar Corp Sdn Bhd [2009] MLJU 1697; [2009] 1 LNS 1766, HC (refd)

National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (folld)

Rmarine Engineering (M) Sdn Bhd v Bank Islam Malaysia Bhd [2012] 10 MLJ 453, HC (refd)

Sagau Batu Bala v Zaharah Mustapha Raja Sewa & Anor [2013] 10 MLJ 843, HC (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Legislation referred to

Arbitration Act 2005 s 42, 42(1A)
Contracts Act 1950 s 56, 56(3)
Evidence Act 1950 s 94

Khoo Guan Huat (Grace Teoh Wei Shan with him) for the plaintiff.
Philip Koh Tong Ngee (Yap Boon Hau with him) for the defendant.

Abu Bakar JC:

BACKGROUND

[1] The plaintiff filed the originating summons ('OS') pursuant to s 42 of the Arbitration Act 2005 ('the Act') to apply for this court to determine some questions of law arising from the learned arbitrator's final award. Also applied are consequential orders thereto.

[2] The final award in favour of the defendant, arose as a result of disputes between the plaintiff and the defendant arising from a collaboration agreement dated 27 January 2006 executed between the parties. The collaboration agreement was broadly speaking a written contract where the defendant is supposed to provide some adventures activities at the premises of the plaintiff.

[3] The eight questions of law posed for this court are as follows:

(i) whether on a true construction of the contract between the parties, the plaintiff was entitled, on 9 December 2009 or any earlier date, to discontinue the collaboration agreement dated 27 January 2006 in the light of cl 3 or such other clauses of the collaboration agreement as may be applicable; and/or

(ii) arising from (1), if the collaboration agreement had not been discontinued, and in the light that as of 9 December 2009 there had been no decision by the Government of Malaysia on the lease on the land where the Kuala Lumpur Tower stands, whether, after a lapse of a reasonable time after 31 May 2009, the collaboration agreement had terminated, come to an end or lapsed; and/or

(iii) arising from (2), whether the paintiff's request to the defendant to vacate the premises was valid in the circumstances; and/or

(iv) whether on a true construction of the contract between the parties, the execution of phase 2 of the collaboration agreement was subject to the approval of the plaintiff's board of directors and the plaintiff's holding company's board of directors pursuant of cl 5 of the collaboration agreement and Schedule 1 to the collaboration agreement; and/or

(v) whether on a true construction of the contract between the parties, it was mandatory that the plaintiff's board of directors and the plaintiff's holding company's board of directors approve the execution of phase 2 of the collaboration agreement; and/or

(vi) arising from (5), whether there was any time period within which the approvals must be given; and/or

(vii) arising from (5), and in light of the learned arbitrator's finding that time was of the essence and in light of s 56 of the Contracts Act 1950, whether the learned arbitrator was correct in awarding damages to the defendant in the circumstances; and/or

(viii) whether on a true construction of the contract between the parties, the learned arbitrator was correct in dismissing the plaintiff's counterclaim, in contradiction to his finding that the plaintiff had merely deferred, not waived, the sharing of revenue.

[4] The plaintiff submits that these questions of law can be summarised as follows:

(a) construction of cl 3 and cl 12 of the collaboration agreement:

(i) whether the learned arbitrator had erred in law in construing cl 3 and cl 12 of the collaboration agreement;

(ii) if the answer to (a)(i) is no, based on the arbitrator's finding that the collaboration agreement had not been discontinued and the fact that the concession had yet to be renewed as of 31 May 2009, whether the arbitrator had erred in law in construing that the collaboration agreement had not terminated, come to an end or lapsed after a reasonable amount of time;

(iii) if the answer to (a)(ii) is yes, whether the plaintiff's request to the defendant to vacate the premises was lawful,

(b) construction of cl 5 and Schedule 1 to the collaboration agreement:

(i) whether the learned arbitrator had erred in law in his construction of cl 5 and Schedule 1 of the collaboration agreement,

(c) error in law in light of s 56 of the Contracts Act 1950:

(i) whether the learned arbitrator when making a finding that time was of the essence in respect of the agreement, had erred in law in failing to consider the application of s 56 of the Contracts Act 1950; and

(d) conflicting findings in relation to the counterclaim:

(i) whether the learned arbitrator had erred in law when he made a finding that the parties had agreed to defer revenue sharing, but then made a conflicting award by denying the plaintiff the counterclaim.

[5] Further the consequential orders requested by the plaintiff are as follows:

(a) vary the final award as set out in Appendix 1 or otherwise as this honourable court deems fit, alternatively; A

(b) set aside the final award; alternatively;

(c) remit the final award in whole or in part; to the arbitral tribunal for reconsideration based on the questions of law as answered by this honourable court; and B

(d) provide for the costs of, and incidental to, this application to be borne by the above named defendant, the claimant in the arbitration; and

(e) for such further or other relief and/or directions to be given as deemed fit and proper by this honourable court. C

[6] In effect the consequential orders sought have the effect that the decision of the learned arbitrator be disturbed, reversed or changed all in favour of the plaintiff. D

SALIENT FACTS

[7] The premises of the plaintiff upon which the adventure actives were to be provided by the defendant and the Kuala Lumpur Tower which the plaintiff operates, were both leased from the Government of Malaysia ('the concession'). The concession was to expire on 31 May 2009.This date is significant as noted in the question of law posed for determination. In this regard cl 3 of the collaboration agreement ('CA') states: E F

> Unless sooner terminated pursuant to clause 11 (misprint for clause 12) hereto, this Agreement shall commence on the Effective Date and shall continue in full force and effect for an initial term until 31 May 2009 and may be renewable at the option of MLKSB for two further terms of 10 years each thereafter, subject to the lease or rights to the Tower Land including the KL Tower being granted to MLKSB for the durations of these extended terms. G

[8] Also relevant as posed in the question of law is cl 12 of the CA regarding the termination of the same, particularly cl 12.3 of the CA which states: H

> This Agreement shall terminate immediately if the lease mentioned in Recital B above between MKLSB and the Federal Lands Commissioner is not renewed and MKLSB is not able to assign this Agreement to the subsequent operator of KL Tower.

And the said Recital B states: I

> The Federal Lands Commissioner is the registered proprietor of the plot of land known as 'Tower Land', the land and surrounding areas on which the building structure known as 'KL Tower' now stands. The Tower Land has been leased to

MKLSB who is the current operator of the KL Tower until 31 May 2009 and thereafter is expected to be leased to Telekom Malaysia Berhad (hereinafter referred to as 'TM') for the next 50 years.

Also material is cl 5 of the CA particularly cl 5.2 which states:

Notwithstanding clause 5.1, MKLSB agrees that commencement for the setting up and implementation of phase 2 should be concurrent with, or soon after, commencement of Phase 1.

[9] Also relevant is Schedule 1 of the CA which states:

SCHEDULE 1

PHASES FOR THE DEVELOPMENT OF THE PROJECT

The Parties agree that the Project will be set up and implemented within the Project Site in the following phases:

A. Phase 1

(1) The following activities are to be set up and implemented with best endeavours by 31st December 2005, including but not limited to DOSH approvals, issuance of contracts to vendors (including but not limited to Jump Technics and Arup), and full management approval of the phase 2 project budget:

(a) 'Twin Flying Foxes', the equipment of which is to be set up from the concrete roof structure near the escalators and extend out to the end of the overhead walkway and water feature facing the direction towards the bus park;

(b) 'Mast Climb', the equipment of which is to be installed up the mast of KL Tower. In this respect, the Parties agree that the setting up and installation of the Mast Climb is at the sole option ofBMSB, and its inclusion shall not in any way affect the validity of this Agreement;

(c) 'Skywalk', the equipment of which is to be set up along the existing maintenance at TH00 level of KL Tower as specified in the Plan; and

(d) 'Reverse Bungy Sling Shot' the equipment of which is to be set up near the existing bus park.

(2) BMSB agrees to fund the entire cost relating to the activities in Phase 1.

B. Phase 2

(1) To commence at the execution of this Agreement, subject to the necessary approvals being obtained from DOSH, the activity known as 'Skyjump' is to be set up and implemented in conjunction with Phase 1. It is agreed that this activity is to operate from TH05 of KL Tower as specified in the Plan.

(2) MKLSB agrees to fund the entire cost relating to the Sky Jump, which at this stage is estimated not to exceed MYR 4.5 million.

C. Phase 3

(1) This phase is in respect of all other activities that the Parties may wish to set up and implement.

(2) It is agreed that implementation of such activities shall be subject to the necessary regulatory and corporate approvals being obtained.

(3) The onus for the cost of Phase 3 shall be determined by mutual agreement between the Parties.

SECTION 42 OF THE ACT

[10] As the application is made pursuant to the provision of s 42 of the Act, it would be appropriate to note that the same states:

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award –

(a) does not contain the arbitral tribunal's reasons; or

(b) does not set out the arbitral tribunal's reasons in sufficient detail.

(4) The High Court may, on the determination of a reference –

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

SUMMARY OF THE PLAINTIFF'S CASE

[11] The plaintiff's case can be summarised as follows.

[12] There is basis for the learned arbitrator's final award ('award') to be challenged as the same had erred in law, failed to construe the CA correctly and failed to consider the relevant laws when arriving at findings of fact.

[13] The error in law would substantially affect the position of the parties. This is submitted pursuant to s 42(1A) of the Act.

[14] The Federal Court's case of *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441 supports the proposition that construction of an agreement ie the CA in this case is a question of law and that principle of construction which is not supported by law can be set aside.

[15] Further elaboration on the plaintiff's case can be seen as stated earlier in the summary of the plaintiff's questions of law as indicated above as well as when this court address the determination of the questions of law set a little later in this judgment.

SUMMARY OF THE DEFENDANT'S CASE

[16] The gist of the defendant's case is as narrated below.

[17] The plaintiff's has not shown the questions of law posed will substantially affects the rights of one or more of the parties in contravention of s 42(1A) of the Act.

[18] There is also limited circumstances where an arbitrator's decision could be set aside. In this regard there are no justification in this case for the learned arbitrator's award to be disturbed.

[19] Also submitted is that the learned arbitrator had complied with all the canon of construction and therefore cannot be alleged to have committed errors of law in his interpretation of the relevant clauses of the CA.

COURT'S FINDINGS

[20] This court would say there are two broad aspects regarding the decision that ought to be given by this court pertaining to the application of the plaintiff now. These are:

(a) the law on the challenge that can be made against an arbitrator's award; and

(b) the reasons for the award and conversely the alleged error in law against the learned arbitrator's award.

[21] Of course these two aspects are being considered in light of all the questions of law posed for the determination of this court.

[22] First therefore this court would consider and deliberate on the aspect of the law that allows for the challenge on the learned arbitrator's award and the limits of that law.

[23] In this regard the first reference would obviously be s 42 of the Act itself which has been narrated earlier. It is patent in the said provision that questions of law arising from the award of the arbitrator, could be forwarded to the High Court for determination. That is not all. The provision further allows the High Court after the determination of those questions to confirm, vary, remit or set aside the award. It is clear therefore that by submitting the questions of law, the decision of the arbitrator can be challenged even to the extent of overturning the whole award.

[24] That is also rightly so because the decision of arbitrators should be subjected to scrutiny and review. If the decision is unsupported by the evidence available, the same can be validly questioned. And towards this end the provision of s 42 of the Act accordingly provides the High Court the power to consider and determine the propriety of such awards.

[25] However there is a need for caution on the extent upon which this court despite the provision of s 42 of the Act could act in judging the correctness of such awards. The scope and limit upon which this court could review the decisions of arbitrators are not without any boundaries. The power to interfere with the decisions of arbitrators is in fact only granted under exceptional circumstances. The court adopts a restrictive approach when reviewing awards arising out of arbitration. There is a line of authorities on this proposition of the law.

[26] In the Federal Court's case of *Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd* [2004] 1 MLJ 401, Siti Norma Yaakob FCJ (as she then was) stated that an arbitrator's award is final, binding and conclusive and can only be challenged in exceptional circumstances. It was further explained that even if an arbitrator had drawn wrong inferences of fact from evidence before him, that in itself would not be sufficient to warrant the setting aside of the award.

[27] The Federal Court in this case went on to quote with approval the judgment of Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 where it is said:

> It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been misapprehended and misunderstood.
>
> ... In the law of arbitration misconduct is used in its technical sense as denoting

A irregularity and not moral turpitude. It includes failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. *But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct*. (Emphasis added.)

B

[28] The Court of Appeal in *AJWA For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625; [2013] 2 CLJ 395 said:

C The court's discretion in setting aside the arbitral award is limited to the narrowly defined circumstances in line with the modern international arbitral practice. Based on ss 8, 9, 37 and 42 of the Act the court should be slow in interfering with an arbitral award, unless it is a case of patent injustice which the law permits in clear terms to intervene.

D

[29] Another case in point is *Rmarine Engineering (M) Sdn Bhd v Bank Islam Malaysia Bhd* [2012] 10 MLJ 453 at p 459 where it is said,

Where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside E only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

F

[30] Yet another case relevant is the judgment by Mohamad Ariff Yusof J (as he then was) in the case of *Maimunah bt Deraman (practising as an architect under the name of D'mai Architect) v Majlis Perbandaran Kemaman* [2010] MLJU 1711; [2011] 9 CLJ 689 where the case of *Majlis Amanah Rakyat v* G *Kausar Corporation Sdn Bhd* [2009] MLJU 1697; [2009] 1 LNS 1766 was referred and where it was decided that the test to apply under s 42 is 'error of law on the face of the award'. The learned judge further held that:

On the agreed basis that the principles on 'error of law on the face of the award' H should continue to apply under s 42 ... The resolution of this action had also to proceed on the basis that the law supported a limited jurisdiction on the part of the High Court to intervene, but lack of appraisal of the law and the evidence was not per se a good ground to set aside or remit for reconsideration by the arbitral tribunal. There had to be a serious failure to analyse and appraise 'material' and 'relevant' evidence.

I

[31] Having explained the position of the law on the scope and limit of the challenge that can be argued against an arbitrator's award, this court would address the second aspect ie the reasons for the award and conversely the alleged

error in law against the learned arbitrator's award. And for this purpose, this court would for the sake of convenience, also at the same time determine the questions of law referred.

DETERMINATION OF THE QUESTIONS OF LAW

[32] The first, second and third questions of law are all related to the issue revolving when and whether the plaintiff can be absolved from further obligations of the CA, having regard to the date 31 May 2009 as the date set for the expiry of the same. All three questions of law can therefore be taken together by this court. In this regard the plaintiff submitted that by virtue of cl 3 of the CA as narrated earlier, the plaintiff has no longer any obligations towards the defendant because the condition imposed in the said provision had not been met as of 31 May 2009. The condition is the requirement that the concession be extended immediately after 31 May 2009 for a further period of twenty years thereafter.

[33] The plaintiff says even if not immediately after 31 May 2009, then at least on 9 December 2009 when the notice of termination was sent to the defendant, the plaintiff should have been ruled to justifiably be in a position not to proceed with the CA. This is because again on that date, there is still no indication that the concession is being extended for the benefit of the plaintiff.

[34] There is also the contention by the plaintiff that cl 3 of the CA should operate in its favour as a reasonable time after 31 May 2009 should have been imposed for the condition to be fulfilled. The plaintiff cannot be asked to wait after this reasonable time to still honour the CA. In any event the plaintiff also submits the option is still on the plaintiff whether the CA would be renewed.

[35] The reliance on the Federal Court's case of *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 by the learned arbitrator on the interpretation of cl 3 of the CA is highly selective according to the plaintiff. The learned arbitrator should have taken note of the case in its entirety instead of relying on a limited portion of the judgment to find cl 3 of the CA cannot be relied by the plaintiff.

[36] All these are the crux of the contention of the plaintiff as the learned arbitrator failed to appreciate these positions which should have been clear in the face of cl 3 of the CA. In essence the plaintiff's says the learned arbitrator had erred in law in his construction of cl 3 and 12 of the CA on these questions of law.

[37] The contention of the plaintiff calls and requires this court to examine in detail the reasons of the learned arbitrator in his construction of the said

clauses of the CA. In this regard the findings of facts and law of the learned arbitrator would be examined, although this court is fully aware of the concession and admission made by the plaintiff the findings of facts are not at all challenged. What is being challenged by the plaintiff is the application of the law by the learned arbitrator based on the facts that was found by the same. In this regard the application of the law is erroneous according to the plaintiff. The findings of facts are nonetheless highlighted to show the basis for the arbitrator's decision as a whole. Because of the contention of the plaintiff, there is a need for this court to be satisfied that the arbitrator's construction of the same is not flawed in law. Here is where the second aspect of the decision of this court as indicated earlier would be elaborated.

[38] Adducing it from the award, the reasons of the arbitrator's decision pertaining to the three questions of law are narrated as follows:

(a) the concession given to the plaintiff would end on 31 May 2005 (para 158 of the award);

(b) however, the plaintiff's concession over the land continued without any break from 1 June 2009–14 March 2011 (para 177 of the award);

(c) the pace of negotiations and lobbying by the plaintiff to obtain renewal of the concession gathered momentum as the expiry date of the concession loomed near (para 158 of the award);

(d) at that time, the prospect for obtaining the renewal of the concession was bright (para 159 of the award);

(e) there was intention of the parties to enter into a long-term contractual relationship (para 173 and 179 and 186 and 237 of the award);

(f) there was no intention of the parties to allow the plaintiff to treat the CA as terminated on 31 May 2009 while the application for renewal of concession was still pending (para 231 and 240 of the award);

(g) there was admission by the plaintiff that the CA did not expire on 31 May 2009 (para 187 of the award). This was due to the act of the plaintiff accepting the defendant to continue their activities (para 210 of the award); and

(h) After the execution of the CA, the plaintiff regretted and started to entertain doubt about the CA. They then started to explore termination of the CA (para 211 of the award).

[39] The findings of the learned arbitrator must be juxtaposed with the cases that have been highlighted by this court on the scope and limits upon which the decision of the same can be reviewed. The findings cannot be faulted merely

because this court considers that different conclusions should be preferred based on evidence before the learned arbitrator.

[40] The only basis for the interpretation of the CA by the learned arbitrator to be considered wrong and be set aside is to find that the same had erred in law. There could not be any other possible reasons to justify the rejection of the learned arbitrator's findings that the plaintiff could not rely on cl 3 of the CA except to say the same had committed an error of law in interpreting the provision.

[41] In this regard this court upon examining the learned arbitration's reasoning in his interpretation of cll 3 and 12 of the CA would emphatically say there is no justification whatsoever to disturb the findings of the same. The law was indeed correctly applied by the learned Arbitrator in his interpretation of those clauses. This court will now explain why the learned arbitrator did not fall into error in law in the construction of those provisions.

[42] First, it is perfectly legitimate at para 173 of the award for the learned arbitrator in law to find as follows:

> It is clear from the language employed to draft clause 3 that although the full life of the collaboration agreement was dependent upon the lease granted to the respondent continuing beyond the 31st May 2009 for a term of at least twenty years, that clause is not couched in language stating that the collaboration agreement would come to an end on 31 May 2009 concurrently with the running out of the term of the lease granted to the respondent. It was therefore abundantly clear that it was the intention of the parties to enter into a long-term contractual relationship pursuant to the collaboration agreement. The respondent had an option to renew the collaboration for the two further terms of ten years each if its lease was renewed for at least a period of or periods encompassing the two further terms.

[43] There is no reason for the learned arbitrator's construction in law of the CA as above to be disturbed. That is how the learned arbitrator found in favour of the defendant in this case and in order for this court to interfere with that legal construction, it must be shown the same had no legal basis whatsoever to conclude as he did. More so when the findings of facts as narrated earlier by the learned arbitrator formed the basis or foundation to arrive at the said construction.

[44] Also the application of the Federal Court's case of *National Land Finance* by the learned arbitrator based on the facts as found by the same was not in law incorrect as alleged by the plaintiff. At para 174 of the award, the learned arbitrator is entitled to find as follows:

It cannot be gainsaid that as of 31 May 2009, no decision had been made yet to grant or not to grant the said lease to the respondent. In this context, the decision of the Federal Court in the case of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 at p 218 is relevant here:

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, no guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is however a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled (see *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 KB 297 at p 304 per Denning LJ and *Property and Bloodstock Ltd v Emerton; Bush v Property and Bloodstock Ltd* [1967] 3 All ER 321 at p330 per Sachs LJ). Until the FIC approval was given liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled.

[45] At para 177 of the award, the learned arbitrator went on further to again rightly quote *National Land Finance* to say:

> However, the facts in this arbitration are far stronger in the claimant's favour than what was stated in *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* as, although no decision had been made on the renewal of the lease, the concession to the respondent over the land continued from the 1 June 2009 to the 9 December 2009 (the date of the notice of discontinuance) and beyond to the 14 March 2011, when the decision granting the renewal of the lease to the respondent with retrospective effect to the 1 June 2009 was made. Therefore, the respondent's lease over the land continued without any break, albeit on a short-term basis. The respondent could not exercise its option under cl 3 in this scenario as the lease had not been granted or renewed in its favour. However, that did not preclude the respondent from allowing the claimant to continue with the collaboration agreement until a decision was made on the renewal of the lease. The respondent could not exercise the option under cl 3 until that decision was made and therefore the argument advanced that the collaboration agreement expired on the 31 May 2009 with the expiry of the existing lease was not sustainable as the respondent had a duty and an obligation to allow the claimant to continue to execute the collaboration agreement as it still continued to exercise the concession over the land and therefore the collaboration agreement was not rendered incapable of performance or rendered unenforceable. The respondent allowed the collaboration agreement to continue until 9 December 2009 when, by the notice of discontinuance, it effectively terminated the lease in breach of the collaboration agreement, in particular cl 3.

[46] The learned arbitrator cannot be said to err in law in applying *National Land Finance* as seen on his reasoning above. The same had analysed the applicability of the case accordingly and applied it based on the facts of the

arbitration before him. There is no reason to agree with the plaintiff that the learned arbitrator did not consider the whole case of *National Land Finance* before applying the same in his interpretation of cll 3 and 12 of the CA. Further the explanation given by the learned arbitrator how he had applied this Federal Court's case in his construction of the provisions, indicates quite clearly this is not a case where there is no basis at all to apply the relevant case law as found by the learned arbitrator.

[47] The next step for this court is to consider the assertion by the plaintiff that *National Land Finance*'s facts were different for its application by the learned arbitrator. In this regard the plaintiff says the case did not hold that the suspension was indefinite. *National Land Finance* according to the plaintiff had not addressed the issue as to what is to happen had there been no reply on the condition as in the present case before the learned arbitrator.

[48] This court would say nothing turns on the attempt by the plaintiff to distinguish this case to say it is not applicable for the consideration of the learned arbitrator. As indicated at paras 174 and 177 of the award, the learned arbitrator had explained and shown why he is of the opinion *National Land Finance* is applicable on the facts before him. This court agrees with the explanation because *National Land Finance* is also a case that deals with the effect of a contingent contract, similar to the case before the learned arbitrator.

[49] Further the Federal Court's case of *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597will indicate that the approach taken by the learned arbitrator to determine the true intention of the parties in relation to the provisions of cll 3 and 12 of the CA is perfectly legitimate. This case had ruled as follows:

> Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98. As Lord Clyde said in *Bank of Credit and Commerce International SA v Munawar Ali* [2001] 2 WLR 735:
>
> The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently

arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. *The meaning of the agreement is to be discovered from the words which they have used in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language by the parties against the background of the surrounding circumstances.* (Emphasis added.)

[50] As quoted and adopted above the learned arbitrator is entitled to go beyond the cold print of cll 3 and 12 of the CA. The last sentence of the above quotation clearly explained there is no strict rule for the interpretation of the same and indeed the background of the surrounding circumstances ought to be taken into account to determine the intention behind the language of the written contract.

[51] Therefore the learned arbitrator was within jurisdiction and therefore cannot be alleged to have committed an error of law in his interpretation of the same. The findings of the learned arbitrators as indicated earlier are indeed the surrounding circumstances and factual matrix forming the background of the transaction. These are matters which the learned arbitrator is entitled to consider in interpreting the cll and to best judge the true intention of the parties in the operation of the same.

[52] Hence the first question posed is answered in the negative in that the plaintiff was not entitled on 9 December 2009 or any earlier date, to discontinue the CA dated 27 January 2006 in the light of cl 3 or such other clauses of the same as may be applicable. The second question is also answered in the negative in that after a lapse of a reasonable time after 31 May 2009, the CA had not terminated, come to an end or lapsed and on the third question, the request by the plaintiff to the defendant to vacate the premises was invalid in the circumstances.

[53] That brings this court to the issue whether the learned arbitrator had erred in law in his construction of cl 5 and Schedule 1 of the CA. This is in regard to the fourth until the sixth questions of law posed for this court and it revolves around the issue whether the execution of phase 2 of the CA needed the approval of the plaintiff's board of directors and the plaintiff's holding company's board of directors.

[54] Here the learned arbitrator found at para 147, 254 and 255 of the award as follows:

[147] According to RW1, it was because the board entertained serious reservations about the skyjump and, in looking out for MKLSB's commercial interest, the board made sure that the contract period was for three and a half years and a further twenty

years upon renewal of the concession and also that the execution of 'all phase 2 activities' (when in fact there was only the single skyjump activity in phase 2) would be subjected to board approval. This was the intention of the board and MKLSB when the respondent entered into the collaboration agreement.

[254] It was clear to my mind that the claimant was doing everything possible to make the project a working success. The respondent, on the other hand, having entered into the collaboration agreement with eyes wide open, began to entertain doubts about the viability of the project especially at the holding-company level, as reflected in the minutes of the board meetings and the evidence of RW2, and consequentially sought to look for ways and means to exit what it thought was a bad or unsafe bargain. Hence, I found that the respondent was intentionally withholding the approvals in question to the skyjump activity in phase 2. This certainly an act of bad faith.

[255] The argument was advanced that the respondent was within its rights not to proceed with the skyjump activity in phase 2 as the necessary approvals by the boards of directors for that activity had not been given. One cannot but view such an argument askance in light of the evidence to the contrary related above and further including the respondent's press release of the 25 February 2006 stating that Menara Kuala Lumpur would be able to offer a full range of adventure activities including the skyjump by August 2006 (see pp 239–240 to CBD2).

[55] The learned arbitrator found that it respect of the approval from the two boards of directors that the same was withheld intentionally without justification and this amounts to bad faith. The learned arbitrator from the findings as reflected from the award above is also of the view that the assertion the approval is required runs contrary to evidence including the press release that a full range of adventure activities would be available by August 2006.

[56] This again indicates that the learned arbitrator is perfectly entitled to draw the factual findings to conclude the surrounding circumstances in his interpretation of cl 5 and Schedule 1 of the CA in line with *Berjaya Times Square*.

[57] Further the plaintiff submitted the findings made by the learned arbitrator here had taken into account extrinsic evidence which is contrary to s 94 of the Evidence Act 1950 which states:

When language used in a document is plain in itself *and when it applies accurately to existing facts*, evidence may not be given to show that it was not meant to apply to such facts. (Emphasis added.)

[58] There is no doubt that the qualification that extrinsic evidence under the above provision is not to be taken into account is that the language of the document (ie the CA) must applies accurately to existing facts. Therefore the learned arbitrator is perfectly entitled to admit extrinsic evidence as long as the CA does not accurately applies to existing facts as suggested by the plaintiff. As

to what these facts are, must only be determined by the learned arbitrator and not the plaintiff nor the defendant. The existing facts are only as found by the learned arbitrator which he is entitled to deduce. And this regard the facts as found by him are:

(a) the approval from the two boards of directors was withheld intentionally without justification and this amounts to bad faith; and

(b) the assertion the approval is required runs contrary to evidence including the press release that a full range of adventure activities would be available by August 2006.

[59] The facts as deduced by the learned arbitrator entitles him to interpret the provisions of cl 5 and Schedule 1 of the CA in the manner he deems appropriate and in fact that interpretation could not be said to fall into an error of law for the reasons explained above.

[60] Therefore again this court is of the view the answers to the fourth until sixth questions of law are in the negative.

[61] This court will now turn to the seventh question of law. This question of law involves the issue on whether the learned arbitrator had erred in law in failing to consider the application of s 56 of the Contracts Act 1950 after deciding time was of the essence in respect of the CA. The provision reads:

(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

(2) If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

(3) If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

[62] The plaintiff submits that not only the learned arbitrator did not consider the above provision, the same had also not invited parties to address this statutory stipulation after ruling time is of the essence.

[63] This court with respect say the submission of the plaintiff here harps on an issue after the findings of the learned arbitrator has already been found with sufficient reasons. This is more so when the issue on s 56 of the Contracts Act 1950 is not pleaded (see *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239). The effect being this specific statutory provision does not arise from the Award and should therefore not be considered (see *Sagau Batu Bata v Zaharah Mustapha Raja Sewa & Anor* [2013] 10 MLJ 843).

[64] The general rule is questions of law need not be pleaded, but here is a case where the facts for the application of the provision are also not pleaded. Since it is not pleaded, no blame lies against the learned arbitrator and he could not be faulted even if it is true that this provision was not addressed. Further, since it is not pleaded, it is only expected that the learned arbitrator is in no position to request for submission by both parties on the application of this statutory provision. He does not have the wisdom of Solomon to anticipate what is not before him.

[65] Further the provision of s 56 (3) of the Contracts Act 1950 as noted above does not operate here for the benefit of the plaintiff as the same had totally failed to perform its part of the bargain in funding the phase 2 activities and obtaining the approval of the boards. This provision as seen, requires some form of performance and not applicable where there is non-performance at all.

[66] Also of relevance is the fact that in this case it was the plaintiff who had wanted to unlawfully terminated the CA, while the defendant had wanted the CA to remain operative but only claim damages for the default by the plaintiff. The facts thus would show that in any event the provision of s 56 of the Contracts Act 1950 cannot be applicable for the plaintiff.

[67] Based on the facts, the learned arbitrator therefore did not commit an error of law in not considering the provision of s 56 of the Contracts Act. Hence his decision in awarding damages to the defendant is confirmed by this court.

[68] The last question of law involves the issue of revenue sharing. The plaintiff submits that the learned arbitrator should not have rejected the plaintiff's counterclaim after finding both parties had merely deferred and not waived the sharing of revenue. The plaintiff says cl 10.1 of the CA provides for sharing of gross revenue and the rejection of the counterclaim showed the learned arbitrator committed an error of law after finding the revenue sharing was only deferred and not waived.

[69] On this issue, this court would stress that the evidence as found by the learned arbitrator needs to be taken into account in order to understand the finding that he has made and the rejection of the plaintiff's counterclaim. In this regard it is important to note that the plaintiff had agreed to waive their right to the sharing of the revenue until the implementation of the adventure activities of 'skywalk' and 'skyjump'. The right to revenue sharing can only happen if phase 2 activity has been carried out and since this is not the case, the plaintiff is not entitled to revenue sharing. The fact is undisputed in this case that phase 2 was not implemented and there is also no dispute that the approval from the boards was not obtained. The counterclaim of the plaintiff was therefore rightly rejected since the condition that the activity be implemented for the revenue sharing was not fulfilled. Hence the learned arbitrator did not commit an error of law regarding this last question of law. The dismissal of the plaintiff's counterclaim therefore is correctly concluded.

[70] On the whole, regarding all questions of law posed to this court, what should always be kept in mind are the cases highlighted earlier in this judgment regarding the scope of s 42 of the Act. Consistent with those cases, this court cannot interfere with the decision of the learned arbitrator unless it is glaringly clear that the same had totally gone wrong in arriving at his decision. There is basis factually and legally for the evaluation of the facts and law by the learned arbitrator in this case. This court could not find reasons to say the learned arbitrator is wrong in his findings including the application of law in that sense.

CONCLUSION

[71] There is no doubt that the award of the learned arbitrator is subject to the scrutiny of this court as a High Court reviewing the decision of the same, no less granted to this court by the provision of s 42 of the Act. The case law also indicates that the awards by arbitrators are not beyond reproach and could be challenged. However there are stringent conditions imposed legally to disturb the findings, conclusions and evaluation of evidence by the learned arbitrator.

[72] Nonetheless there are as explained, no reasons to find that the learned arbitrator had committed errors of law on all questions of law posed for this court to determine. The learned arbitrator in arriving at the award had apply the correct relevant law and in regard to the findings of facts, as rightly conceded by the plaintiff, the learned arbitrator is at full liberty to decide on the same. The learned arbitrator too did not at any point of time misconstrued the law that he had applied in giving the award. His application of the case law and his alleged non-consideration of specific statutory provision, are all pursuant to the facts of the arbitration before him. He must be shown to have misapplied these case law or had failed to consider relevant laws. This court is not with the plaintiff that this has been the case.

[73] This court for the reasons adumbrated, would with respect dismiss the plaintiff's OS for the application. Also having heard both parties on costs, this court accordingly granted costs for the defendant in this case. Though there is submission that the issues raised in this court were novel issues and there were voluminous affidavits that needed to be considered and argued, the fact remains most of the issues and matters raised in the affidavits had been raised in the arbitration itself. Therefore this court is of the opinion a fair and reasonable costs for the defendant is RM35,000.

Plaintiff's application dismissed with costs RM35,000.

Reported by Kanesh Sundrum